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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

FATHY ABDELRAHIM,

Plaintiff and Appellant,

v.

GUARDSMARK, LLC, et al.,

Defendants and Respondents.

B207270

(Los Angeles County
Super. Ct. No. BC359607)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Ann Jones, Judge. Affirmed.

Gary Rand & Suzanne E. Rand-Lewis for Plaintiff and Appellant.

Low, Ball & Lynch, Steven D. Werth and Laura S. Flynn for Defendants
and Respondents.

Appellant Fathy Abdelrahim appeals from the judgment upon an order for directed verdicts on his negligence and misrepresentation claims and a jury verdict in favor of respondent Guardsmark, LLC (“Guardsmark”) on the remaining claims. Before this court, appellant challenges the admission and exclusion of certain evidence and the court’s order directing the verdict on two of his claims. As we shall explain, we are unable to review two of the challenges to evidentiary rulings because appellant failed to provide a sufficient appellate record for this court to review, and as to the other challenges to the court’s order directing the verdicts and admitting evidence, we find no error. Accordingly, we affirm.

BACKGROUND AND PROCEDURAL HISTORY

Guardsmark employed appellant as a security guard. Guardsmark was contracted by Marriott Los Angeles Downtown, a hotel, to provide security for the hotel. In March 2005, Guardsmark placed appellant at Marriott as director of security. In this position, appellant reported to both Guardsmark supervisors and Marriott’s general manager.

In October 2005, Guardsmark terminated appellant. One episode that led respondent to terminate appellant occurred approximately six months into appellant’s tenure as director of security, in March 2005. On that day, the hotel experienced a power outage. As director of security, appellant had certain duties he was required to perform during emergency situations. Marriott staff was not satisfied with appellant’s performance that day. In the aftermath of the power outage, Marriott employee Regina Stryker expressed her dissatisfaction with appellant’s performance in an email that she sent to Guardsmark supervisor Jake Gutierrez (the “Stryker email”).

Although Guardsmark indicated that the termination was based on poor performance, appellant, who is a native of Egypt and a practicing Muslim, believed it was due to ethnic and religious bias. Appellant filed suit against Guardsmark alleging breach of contract, breach of covenant of good faith and fair dealing, wrongful termination, violation of California Government Code section 12900, defamation, intentional

infliction of emotional distress, negligence, misrepresentation, and violation of Business and Professions Code section 17200.

The matters were tried before a jury between February 4, 2008, and February 15, 2008. At the trial, Guardsmark offered the Stryker email into evidence and the court admitted the document over appellant's hearsay objection. Appellant, for his part, offered two items of evidence: (1) a document described as a "Security Incident Report," which appellant claimed was prepared by Marriott following the power outage; and (2) the sworn statement of Felipe Diaz, who succeeded appellant as Marriott director of security. The court excluded appellant's documents.

After both sides had presented their cases, Guardsmark filed a motion for a directed verdict on all counts. The trial court granted the motion with respect to the negligence and misrepresentation causes of action. The jury subsequently returned verdicts in favor of Guardsmark on the other claims.

This appeal followed.

DISCUSSION

The issues appellant raises on this appeal concern the exclusion and admission of certain evidence during the trial and the court's order granting Guardsmark's motion for directed verdicts. Specifically, appellant claims that the trial court erred by failing to admit into evidence: (1) an incident report from the day of the power outage; and (2) the sworn statement of Felipe Diaz. In addition, appellant contends that the trial court erred by admitting the Stryker email into evidence. He also argues that the trial court erred by granting directed verdicts on the negligence and misrepresentation claims.

I. Evidentiary Rulings

This court reviews the admission and exclusion of evidence for abuse of discretion. (*People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th

619, 639-640.) Under this standard, an appellate court will disturb a trial court's exercise of discretion only when, viewing all facts and circumstances most favorably to the trial court, no reasonable judge could have reached the challenged result. (*Smith v. Smith* (1969) 1 Cal.App.3d 952, 958.)

As we shall explain, we review the merits only of appellant's claim with respect to the admission of the Stryker email because appellant has failed to present an adequate appellate record to allow for the review of his other claims concerning the exclusion of his evidence.

1. Documents Excluded by the Trial Court

Appellant contends that the trial court erred by refusing to admit two of his exhibits into evidence. The first exhibit was a "Security Incident Report," which the trial court refused to admit based on inadequate foundation. The second exhibit was the sworn statement of Felipe Diaz.¹ We cannot fully assess the merits of appellant's arguments concerning the exclusion of these two documents because appellant has not included the documents in the appellate record. The appellant bears the burden of providing a record adequate to adjudicate his claims. (*Aguilar v. Avis Rent A Car System* (1999) 21 Cal.4th 121, 148-149.) Further, "where exhibits are missing we will not presume they undermine the judgment." (*Western Aggregates v. County of Yuba* (2002) 101 Cal.App.4th 278, 291.)

Nonetheless, we also note that, based on how the documents were characterized in appellant's brief, it is likely that the documents were properly excluded. With respect to the incident report, appellant failed to establish at trial two key foundational requirements: when the incident report was prepared and who prepared it.

¹ The court's rationale for excluding the statement is not clear. When the statement was offered, respondent objected, citing Evidence Code section 352 and pointing out that respondent had never before seen the document. The court sustained the objection, but given the discussion reflected in the record and the characterization of the document by the parties it appears that the court concluded the statement was inadmissible hearsay.

Even if it was improperly excluded, appellant has not demonstrated that the exclusion of this report caused him prejudice.

Similarly, based on how appellant has characterized the statement of Felipe Diaz, it appears the document contained inadmissible hearsay. Furthermore, because appellant has provided an inadequate record, we are unable to determine whether the trial court correctly excluded the statement, or whether the exclusion was prejudicial. It is appellant's failure to furnish an adequate record which precludes us from reaching any other conclusion.

2. Stryker's Email.

On September 12, 2005, after the power outage at the Marriott, Regina Stryker, a Marriott employee sent an email to Jake Gutierrez of Guardsmark describing what had occurred during the outage and how appellant responded to the events. Stryker's account painted, generally, a poor picture of appellant's performance. At trial, the email was admitted into evidence over appellant's objection.

Appellant argues the Stryker email was inadmissible hearsay and should have been excluded. We disagree. There are two independent bases upon which the email could have been properly admitted into evidence. The trial court decided to admit the email for the limited purpose of establishing that an email was sent from Stryker to Gutierrez. An out of court statement is hearsay only if offered to prove the truth of the matter asserted. (Evid. Code, § 1200, subd. (a).) For the limited purpose of establishing only that an email was sent, the email is simply not hearsay. Further, the court issued a limiting instruction to the jury, explaining the email was not being offered to establish the truth of the matter asserted, but instead to prove only that an email was sent. Admitting the evidence for this purpose and issuing a limiting instruction to the jury was well within the discretion of the trial court.

But even if the email was offered to prove the truth of the matter asserted, we conclude that the email falls within the business record exception to the hearsay rule and was thus properly admitted by the trial court. Evidence Code section 1271 provides that business records are excepted from the hearsay rule when four requirements are satisfied:

(1) the writing must be made in the normal course of business; (2) the writing must be made at or near the time of the incident; (3) a qualified witness must testify to the identity of the writing and its mode of preparation; and (4) the sources of information and method and time of preparation must indicate its trustworthiness.

All four requirements were satisfied in the current case. Stryker testified that the email, and others like it, were regularly prepared by her as part of her regular job duties. She testified that she created the email on the day of the incident. As the author of the email, she was qualified to testify, and did testify, to its identity and mode of preparation. Finally, based on Stryker's testimony, the trial court could have reasonably determined that the contents of the email were trustworthy. Therefore, the trial court would also have been acting within its discretion had it admitted the email as a business record exception to the hearsay rule.

Finally, even if the trial court erred by admitting the email, appellant has failed to demonstrate that he was prejudiced by its admission. Stryker testified at the trial. Her testimony covered much of what was contained in the email. Thus, even if the email had been excluded the jury learned of facts contained in the email. During trial appellant was free to question Stryker about the events documented in the email. Under these circumstances, we find no prejudice.

For these reasons, we conclude the court did not err in admitting the email into evidence.

II. The Directed Verdicts

Appellant also challenges the directed verdicts on his misrepresentation and negligence claim. When reviewing an order for a directed verdict, this court views all the evidence in the light most favorable to the appellant, resolving all conflicts and drawing all inferences in appellant's favor, and reversing only if there is substantial evidence proving the elements of appellant's case. (*Colbaugh v. Hartline* (1994) 29 Cal.App.4th 1516, 1521.)

1. Misrepresentation Claim

In this case, the trial court issued a directed verdict on appellant's misrepresentation claim because the court found that appellant presented no evidence of damages. Our review of the record will therefore focus on evidence of damages.

We begin by looking at appellant's second amended complaint. In count twelve, appellant claims that he was promised "equal employment opportunities" and that respondent had "diversity" and "no slur" policies. Appellant claims that respondent did not, in fact, offer appellant equal opportunities, and did not implement the two policies. Appellant maintains that respondent's statements fraudulently induced him to take employment with respondent and to stay employed longer than he should have. As a result, appellant claims to have suffered lost wages, benefits, and other "special damages." Appellant's theory seems to be that were he not working for respondent, he would have been working for someone else who would have paid him more, or perhaps offered him a better career path. In that case, appellant should have presented evidence to prove those damages and quantify them. He did not do so.

After reviewing appellant's trial testimony and the exhibits appellant has included in the record, it appears that appellant presented no evidence whatsoever of damages resulting from alleged misrepresentations by respondent. Appellant testified about difficulties he had securing a new job after his employment with respondent was terminated, but nowhere did he offer any evidence of what actual damages he suffered due to a misrepresentation by respondent. There is no testimonial or documentary record of any damages, or any evidence from which even a favorable inference on the subject can be drawn. Therefore, the order of directed verdict was appropriate.

2. Negligence Claim

The trial court ordered a directed verdict on appellant's negligence claim as a matter of law, finding the claim "alleged matters that were within the exclusive province of workers' compensation." Whether this claim falls exclusively under workers' compensation can be resolved on the pleadings, without recourse to any other evidence.

Therefore, in this context, the order for a directed verdict on this issue is reviewed *de novo*.

Labor Code section 3601 provides that, with limited exceptions, a workers' compensation claim is the exclusive remedy for workplace injuries suffered while the worker is acting within the scope of employment. Where a claimant alleges facts that place the claim squarely within the purview of the workers' compensation statutes, the claimant must allege additional facts negating the exclusivity rule, or else no civil action will lie. (*Hughes v. Macarthur Co.* (1987) 192 Cal.App.3d 951, 957.)

Here, appellant alleged that respondent negligently screened and hired supervisors, and that respondent negligently failed to maintain a work environment free from discrimination based on race or national origin. Any injury suffered due to this type of alleged conduct would be a direct consequence of the employment relationship, and therefore the negligence claim would be covered by workers' compensation.

(*Vuillemainroy v. American Rock & Asphalt, Inc.* (1999) 70 Cal.App.4th 1280, 1282 [workers compensation laws bar employee claims based on employer negligence].) In order to maintain his civil action under these circumstances, appellant should have alleged other facts demonstrating that he was not bound by the exclusivity rule. Appellant failed to allege additional facts indicating that his negligence claim fits into any exceptions to the exclusivity rule. Accordingly, the negligence action cannot lie, and the trial court properly ordered a directed verdict on this claim.

In any event, appellant has not demonstrated he suffered prejudice as a result of the court's order granting the directed verdict on the negligence claim. Even if the claim was not preempted by workers compensation laws, appellant would not have prevailed upon it in view of the jury's verdicts in favor of Guardsmark on the other claims.

DISPOSITION

The judgment is affirmed. Respondents are entitled to costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.